

(C) The exempt board of trade holds out the market to the public as performing a price discovery function for the cash market for the commodity.

(iii) *Price discovery determination.* Following receipt of a notice under paragraph (c)(2)(ii) of this section, or on its own initiative, the Commission may notify an exempt board of trade operating a market in reliance on the exemption in Section 5d of the Act that the facility appears to meet the criteria for performing a significant price discovery function under paragraph (c)(2)(i)(A) or (B) of this section. Before making a final price discovery determination under this paragraph, the Commission shall provide the exempt board of trade with an opportunity for a hearing through the submission of written data, views and arguments. Any such written data, views and arguments shall be filed with the Secretary of the Commission in the form and manner and within the time specified by the Commission. After consideration of all relevant matters, the Commission shall issue an order containing its determination whether the facility performs a significant price discovery function under the criteria of paragraph (c)(2)(i)(A) or (B) of this section.

(iv) *Price dissemination.* (A) An exempt board of trade that the Commission has determined performs a significant price discovery function under paragraph (c)(2)(iii) of this section shall disseminate publicly, and on a daily basis, all of the following information with respect to transactions executed in reliance on the exemption in Section 5d of the Act:

(1) Contract terms and conditions, or a product description, and trading conventions, mechanisms and practices;

(2) Trading volume by commodity and, if available, open interest; and

(3) The opening and closing prices or price ranges, the daily high and low prices, a volume-weighted average price that is representative of trading on the board of trade, or such other daily price information as proposed by the board of trade and approved by the Commission.

(B) The exempt board of trade shall make such information readily available to the news media and the general public without charge no later than the

business day following the day to which the information pertains.

(v) *Modification of price discovery determination.* An exempt board of trade that the Commission has determined performs a significant price discovery function under paragraph (c)(2)(iii) of this section may petition the Commission at any time to modify or vacate that determination. The petition shall contain an appropriate justification for the request. The Commission, after notice and opportunity for a hearing through the submission of written data, views and arguments, shall by order grant, grant subject to conditions, or deny such request.

(3) *Annual Certification.* A board of trade operating under Section 5d of the Act as an exempt board of trade shall file with the Commission annually, no later than the end of each calendar year, a notice that includes: (i) A statement that it continues to operate under the exemption; and (ii) a certification that the information contained in the previous Notification of Operation as an Exempt Board of Trade is still correct.

[66 FR 42270, Aug. 10, 2001, as amended at 71 FR 1961, Jan. 12, 2006]

### § 36.3 Exempt commercial markets.

(a) *Notification.* An electronic trading facility relying upon the exemption in Section 2(h)(3) of the Act shall notify the Commission of its intention to do so. This notification, and subsequent notification of any material changes in the information initially provided, shall be filed with the Secretary of the Commission at its Washington, DC headquarters, in electronic form, shall be labeled as "Notification of Operation as an Exempt Commercial Market," and shall include the information and certifications specified in Section 2(h)(5)(A) of the Act.

(b) *Required information.* (1) A facility operating in reliance on the exemption in section 2(h)(3) of the Act, initially and on an on-going basis, must:

(i) Provide the Commission with access to the facility's trading protocols, either electronically or in hard copy form;

(ii) Identify to the Commission those transactions conducted on the facility with respect to which it intends, in

good faith, to rely on the exemption in section 2(h)(3) of the Act, and which averaged five trades per day or more over the most recent calendar quarter, and, with respect to such transactions, either:

(A) Submit to the Commission, in a form and manner acceptable to the Commission, a report for each business day, showing for each transaction executed on the facility in reliance on the exemption set forth in section 2(h)(3) of the Act, and meeting the five trades per day or more threshold test of this section, the following information: the commodity, the location, the maturity date, whether it is a financially settled or physically delivered instrument, the date of execution, the time of execution, the price, the quantity, and such other information as the Commission may determine, and for an option instrument, in addition to the foregoing information, the type of option (call or put) and the strike price. Each such report shall be electronically transmitted weekly, within such time period as is acceptable to the Commission after the end of the week to which the data applies; or

(B) Provide the Commission, in a form and manner acceptable to the Commission, with electronic access to those transactions conducted on the facility in reliance on the exemption in section 2(h)(3) of the Act, and meeting the five trades per day or more threshold test of this section, which access would allow the Commission to compile the information described in paragraph (b)(1)(ii)(A) of this section and create a permanent record thereof;

(iii) Maintain a record of allegations or complaints received by the trading facility concerning instances of suspected fraud or manipulation in trading activity conducted in reliance on the exemption set forth in section 2(h)(3) of the Act. The record shall contain the name of the complainant, if provided, the date of the complaint, the market instrument, the substance of the allegations, and the name of the person at the trading facility who received the complaint; and

(iv) Provide to the Commission, either electronically or in hard copy form, a copy of the record of each complaint received pursuant to paragraph

(b)(1)(iii) of this section that alleges, or relates to, facts that would constitute a violation of the Act or Commission regulations. Such copy shall be provided to the Commission no later than 30 calendar days after the complaint is received. Provided, however, that in the case of a complaint alleging, or relating to, facts that would constitute an ongoing fraud or market manipulation under the Act or Commission regulations, such copy shall be provided to the Commission within three business days after the complaint is received.

(2) The Commission hereby delegates, until the Commission orders otherwise, the authority to determine the form and manner of submitting reports, the time within which such reports shall be filed, and the form and manner of providing electronic access, under paragraph (b)(1) of this section, to the Director of the Division of Market Oversight and such members of the Commission's staff as the Director may designate. The Director may submit to the Commission for its consideration any matter that has been delegated by this paragraph. Nothing in this paragraph prohibits the Commission, at its election, from exercising the authority delegated in this paragraph.

(3) *Special calls.* (i) All information required upon special call of the Commission under section 2(h)(5)(B)(iii) of the Act shall be prepared in the form and manner and in accordance with the instructions, and shall be transmitted at the time and to the office of the Commission, as may be specified in the call.

(ii) The Commission hereby delegates, until the Commission orders otherwise, the authority to make special calls as set forth in section 2(h)(5)(B)(iii) of the Act to the Director of the Division of Clearing and Intermediary Oversight and to the Director of The Division of Market Oversight to be exercised by either Director or by such other employee or employees as the Director may designate. The directors may submit to the Commission for its consideration any matter that has been delegated in this paragraph. Nothing in this paragraph prohibits the Commission, at its election, from exercising the authority delegated in this paragraph.

(4) *Subpoenas to foreign persons.* A foreign person whose access to a trading facility is limited or denied at the direction of the Commission based on the Commission's belief that the foreign person has failed timely to comply with a subpoena as provided under section 2(h)(5)(C)(ii) of the Act shall have an opportunity for a prompt hearing under the procedures provided in §§ 21.03(g) and (h) of this chapter.

(c) *Additional requirements—(1) Prohibited representation.* An electronic trading facility relying upon the exemption in section 2(h)(3) of the Act shall not represent to any person that it is registered with, designated, recognized, licensed or approved by the Commission.

(2) *Market data dissemination.* (i) *Criteria for price discovery determination.* An electronic trading facility operating a market in reliance on the exemption in section 2(h)(3) of the Act performs a significant price discovery function for transactions in the cash market for a commodity underlying any agreement, contract, or transaction executed or traded on the electronic trading facility when:

(A) Cash market bids, offers or transactions are directly based on, or quoted at a differential to, the prices generated on the market on a more than occasional basis; or

(B) The market's prices are routinely disseminated in a widely distributed industry publication and are routinely consulted by industry participants in pricing cash market transactions.

(ii) *Notification.* An electronic trading facility operating in reliance on Section 2(h)(3) of the Act shall notify the Commission when:

(A) It has reason to believe that cash market bids, offers or transactions are directly based on, or quoted at a differential to, the prices generated on the market on a more than occasional basis;

(B) It has reason to believe that the market's prices are routinely disseminated in a widely distributed industry publication and are routinely consulted by industry participants in pricing cash market transactions; or

(C) The market holds itself out to the public as performing a price discovery function for the cash market for the commodity.

(iii) *Price discovery determination.* Following receipt of a notice under paragraph (c)(2)(ii) of this section, or on its own initiative, the Commission may notify an electronic trading facility operating in reliance on section 2(h)(3) of the Act that the trading facility appears to meet the criteria for performing a significant price discovery function under paragraph (c)(2)(i)(A) or (B) of this section. Before making a final price discovery determination under this paragraph, the Commission shall provide the electronic trading facility with an opportunity for a hearing through the submission of written data, views and arguments. Any such written data, views and arguments shall be filed with the Secretary of the Commission in the form and manner and within the time specified by the Commission. After consideration of all relevant matters, the Commission shall issue an order containing its determination whether the electronic trading facility performs a significant price discovery function under the criteria of paragraph (c)(2)(i)(A) or (B) of this section.

(iv) *Price dissemination.* (A) An electronic trading facility that the Commission has determined performs a significant price discovery function under paragraph (c)(2)(iii) of this section shall disseminate publicly and on a daily basis all of the following information with respect to transactions executed in reliance on the exemption:

(1) Contract terms and conditions, or a product description, and trading conventions, mechanisms and practices;

(2) Trading volume by commodity and, if available, open interest; and

(3) The opening and closing prices or price ranges, the daily high and low prices, a volume-weighted average price that is representative of trading on the trading facility, or such other daily price information as proposed by the facility and approved by the Commission.

(B) The trading facility shall make such information readily available to the news media and the general public without charge no later than the business day following the day to which the information pertains.

(v) *Modification of price discovery determination.* A trading facility that the

Commission has determined performs a significant price discovery function under paragraph (c)(2)(iii) of this section may petition the Commission at any time to modify or vacate that determination. The petition shall contain an appropriate justification for the request. The Commission, after notice and opportunity for a hearing through the submission of written data, views and arguments, shall by order grant, grant subject to conditions, or deny such request.

(3) *Required representation.* The facility must represent in the notification provided under paragraph (a) of this section that it requires, and require, that each participant agree to comply with all applicable law and the facility must have a reasonable basis for believing that authorized participants are “eligible commercial entities” as defined in section 1a(11) of the Act.

(4) *Annual Certification.* An electronic trading facility operating in reliance upon the exemption in Section 2(h)(3) of the Act shall file with the Commission annually, no later than the end of each calendar year, a notice that includes: (i) A statement that it continues to operate under the exemption; and (ii) a certification that the information contained in the previous Notification of Operation as an Exempt Commercial Market is still correct.

[66 FR 42270, Aug. 10, 2001, as amended at 67 FR 62352, Oct. 7, 2002; 69 FR 43294, July 20, 2004; 71 FR 1962, Jan. 12, 2006]

## PART 37—DERIVATIVES TRANSACTION EXECUTION FACILITIES

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APPENDIX A TO PART 37—GUIDANCE ON COMPLIANCE WITH REGISTRATION CRITERIA

APPENDIX B TO PART 37—GUIDANCE ON COMPLIANCE WITH CORE PRINCIPLES

AUTHORITY: 7 U.S.C. 2, 5, 6, 6c, 6(c), 7a and 12a, as amended by Appendix E of Pub. L. 106–554, 114 Stat. 2763A–365.

SOURCE: 66 FR 42271, Aug. 10, 2001, unless otherwise noted.

### § 37.1 Scope and definition.

(a) *Scope.* The provisions of this part apply to any board of trade operating as or applying to become registered as a derivatives transaction execution facility under Sections 5a and 6 of the Act.

(b) *Definition.* As used in this part, the term “eligible commercial entity” means, and shall include, in addition to a party or entity so defined in section 1a(11) of the Act, a registered floor trader or floor broker trading for its own account, whose trading obligations are guaranteed by a registered futures commission merchant.

[66 FR 42271, Aug. 10, 2001, as amended at 71 FR 1962, Jan. 12, 2006]

### § 37.2 Exemption.

Contracts, agreements or transactions traded on a derivatives transaction execution facility registered as such with the Commission under Section 5a of the Act, the facility and the facility’s operator are exempt from all Commission regulations for such activity, except for the requirements of this Part 37 and:

(a) Section 15.05, Part 40 and Part 41 of this chapter, including any related definitions and cross-referenced sections; and

(b) Sections 1.3, 1.31, 1.59(d), 1.60, 1.63(c), 33.10, and Part 190 of this chapter and, as applicable to the market, §§15.00 to 15.04 and Parts 16 through 21 of this chapter, including any related definitions and cross-referenced sections, which are applicable as though they were set forth in this Part 37 and included specific reference to derivatives transaction execution facilities.

[71 FR 1962, Jan. 12, 2006]

### § 37.3 Requirements for underlying commodities.

(a) *Trading facilities limited to eligible traders.* Trading facilities limited to eligible traders as defined by section 5a(b)(3) of the Act, may trade any contract of sale of a commodity for future